MAYER BROWN LLP
JOHN NADOLENCO (SBN 181128)
jnadolenco@mayerbrown.com
CHRISTOPHER MURPHY (SBN 120048)
cmurphy@mayerbrown.com
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

NEIL DYMOTT FRANK MCFALL & TREXLER APLC
MICHAEL I. NEIL
mneil@neildymott.com
1020 2nd Avenue, Suite 2500
San Diego, CA 92101-4959
Telephone: (619) 238-1712
Facsimile: (619) 238-1562

Attorneys for Plaintiff
BLACKWATER LODGE AND TRAINING CENTER, INC., dba BLACKWATER WORLDWIDE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba BLACKWATER WORLDWIDE,

Plaintiff,

v.

KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; AFSANEH AHMADI, in her capacity as Chief Building Official of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive,

Defendants.

Case No. 08 CV 0926 H (Wmc)

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

Date: May 30, 2008
Time: 1:30 p.m.
Place: Courtroom of the Honorable Marilyn L. Huff

Defendants' Opposition to Blackwater's *Ex Parte* Application for a Temporary Restraining Order is more noteworthy for what it does not say than what it does. Defendants (collectively, the "City") no longer claim that Blackwater Lodge and Training Center, Inc. dba Blackwater Worldwide ("Blackwater") was required to follow a discretionary process, or that vocational schools or target ranges are not proper in Otay Mesa. Instead, the City's opposition raises several incorrect arguments and inaccurate innuendoes that Blackwater is compelled to address. And significantly, the City fails to address dispositive issues raised by Blackwater, thereby conceding them and making the requested relief appropriate. See *Day v. D.C. Dep't of Consumer & Regulatory Affairs*, 191 F. Supp. 2d 154, 159 (D.D.C. 2002) ("If a party fails to counter an argument that the opposing party makes in a motion, the court may treat that argument as conceded.")

First, contrary to the City's public position, the City's opposition does not argue that discretionary approval is necessary to operate the proposed training facility (referred to as a vocational school under the San Diego Municipal Code or "SDMC"). Rather, the City claims that Blackwater failed to apply for a *ministerial permit* to change the use of the existing structure from a warehouse to a training facility. (Opp. at 6.) This argument suffers from two fatal flaws. First, the General Application dated February 8, 2008, attached as Exhibit C-1 to the Ahmadi Declaration and submitted by the City in support of its Opposition, identifies the "Proposed Use" as "Training Facility." It also identifies the project as adding an "indoor firing range," consistent with the law enforcement training nature of the facility. Moreover, the Hazardous Material Questionnaire included as Exhibit C-7 identifies the "business activities" of the facility as "Training Facility for Law Enforcement." Clearly, the City was well aware of the nature of the proposed use—and that only ministerial permits were needed.

Ahmadi Dec., Exs. A-7, B-5, and C-9 (categorizing the permits at issue as "ministerial").

Furthermore, as vocational schools are permitted as a matter of right under applicable zoning (see Blackwater's *Ex Parte* Application, pp. 10-12), the City may not deny Blackwater a Certificate of Occupancy on these grounds. Blackwater did not need the City's permission to use the Otay Mesa Facility in a way that was an allowable use as a matter of right under the zoning restrictions. SDMC § 1517.0301 allows "all uses permitted in the IH-2-1 zone" listed in § 131.0622. According to § 131.0622, a vocational/trade school is use permitted as of right, without any approval required. Indeed, the City effectively reversed its legal position between the time the City Attorney Office issued its legal opinion and the time it drafted its Opposition. The City now claims only that an additional *ministerial permit* submittal prevents occupancy. In doing so, the City concedes that Blackwater is entitled, as a matter of law, to the certificate of occupancy, and now simply seeks to delay occupancy.

Second, the City claims that Blackwater should have proceeded in *state* court via mandamus. But this matter is squarely before this Court, which has subject matter jurisdiction thereof under both diversity of citizenship and federal question grounds (that is, Blackwater's constitutional claims and claims under 42 U.S.C. § 1983). Defendants have not offered any explanation for why this Court does not have jurisdiction, because of course, this Court does.

Furthermore, federal courts sitting in diversity typically are required to apply state law, and routinely enjoin local governmental officials who are not complying with state law. *See, e.g., Wal-Mart Stores, Inc. v. County of Clark*, 125 F. Supp. 2d 420, 427 (D. Nev. 1999) (granting preliminary injunction against Clark County, Nevada, finding that issuance of building permit was "a purely ministerial act"). Federal courts likewise routinely enjoin local government officials under federal law. *See, e.g., Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1060 (9th Cir. 2007) (reversing denial of request to enjoin the city, city council members and the mayor to reinstate certain policies at a homeless shelter); *Hurwitt v. City of Oakland*, 247 F. Supp. 995, 1007-09 (N.D. Cal. 1965) (enjoining mayor, the city manager and the police chief from interfering with, or refusing to provide police protection for, a Vietnam Day parade). When a plaintiff's federal rights have been violated (or when diversity of citizenship properly brings a matter into the federal court system), there is no need for plaintiff to proceed in state court.

Defendants' reference to mandamus also misses the point as to the procedural status of this action: mandamus is the ultimate remedy in a state superior court action under Code of Civil Procedure § 1085, but here, the relief requested is a provisional or temporary remedy, that is, a temporary restraining order. Nothing prevents a federal district court with subject matter jurisdiction from granting the same relief as could be pursued in a state mandamus action.[1] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"); Federal Rule of Civil Procedure 65.

Third, the City claims Blackwater lacks standing to assert claims under 42 U.S.C. § 1983—but conceding that it has standing to assert its injunctive and declaratory relief claims under state law. However, since the City's conduct in refusing to send the Certificate of Occupancy as required by the SDMC is causing a direct, concrete and irreparable injury to Blackwater, it has standing to assert its claims. Article III requires three elements for standing: (1) a threatened or actual distinct and palpable injury to the plaintiff; (2) a fairly traceable causal nexus between the alleged injury and the defendant's challenged conduct; and (3) a

[1] Indeed, the relief Blackwater requested in its first cause of action was akin to mandamus.

substantial likelihood that the requested relief will redress or prevent the injury. *McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir. 1983). All three elements are clearly fulfilled here. Indeed, the City's letter (by Defendant Broughton) announcing it would not send the Certificate of Occupancy *is addressed to Blackwater*. Bonfiglio Dec. Ex. I. The City knew exactly whose interests were at stake and whose constitutional rights it was infringing.

Fourth, the City suggests that Blackwater cannot rely on the permits because they were applied for by other entities. This has been a red herring since the beginning. All of the entities that applied had a legal right to apply for the permits. *See* SDMC §112.0102(a)(3) (allowing permit application by anyone with "interest or entitlement to the use of the property"). Indeed, it is customary for contractors to apply for permits and Certificates of Occupancy on behalf of their clients. Declaration of Joseph Bohac filed concurrently herewith. Once approved, the permits and Certificates of Occupancy relate to the facility, not an individual or entity. Indeed, the City's paperwork shows as much. Ahmadi Dec., Ex. C-1 ("project title" is "Southwest Law Enforcement") and Ex. C-3 (permitted "issued to Raven Development"). Were this not the case, every homeowner that wished to remodel his or her house, would be forced to wait in line at Development Services to apply for the permit in his or her name. And when that homeowner moved, the new owner would need to renew the permits. The City's argument is, at best, disingenuous.

Fifth, the City claims that Blackwater did not obtain a permit for its ship simulator. This Court should disregard this after-the-fact justification that was *not* a reason relied upon by the City in its refusal to send Blackwater its Certificate of Occupancy. Bonfiglio Dec. Ex. I (May 19, 2008 letter from Defendant Broughton). Nonetheless, Blackwater has long been discussing the issue of the ship simulator with the City. The simulator is in a section of the facility that

Blackwater plans as a future use. A "future use area" never affects the permits for the rest of a facility. It is akin to identifying on plans for a house that the homeowner plans to add a swimming pool later. The City cannot avoid issuing a Certificate of Occupancy today because of questions it may have as to a potential future use. Thus, even if an additional permit is required for the simulator, that should not affect Blackwater's ability to occupy and use the rest of the facility for vocational instruction (including the target range).

Lastly, the City claims that Blackwater has not established irreparable harm. But the City offered no rebuttal to Blackwater's evidence on this subject. The City does not deny that it has treated other vocational schools and target ranges differently than it treated Blackwater; thus, Blackwater has established at least a *prima facie* case for violation of the equal-protection and dormant-commerce clauses. The record also clearly shows that the City is using manufactured, after-the-fact justifications to try to deny Blackwater's vested rights, without providing Blackwater with due process. The City does not claim otherwise. These constitutional violations are enough to show irreparable harm. *See* Blackwater's Ex Parte Application at 21:5-19. Moreover, Blackwater's harm is not "strictly monetary." Opp. at 8:4. Its reputation likely will be severely damaged and, despite the City's unsupported contention to the contrary, courts routinely grant injunction relief because reputational harm often is difficult, if not impossible, to quantify. *See, e.g., United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002) (damage to reputation can constitute irreparable injury, especially if damages would be uncertain or inadequate).[2]

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[2] The City also incorrectly argues that San Diego City College is providing SRF-B training. Opp. at 8:11-18. It is not; Blackwater is. San Diego Community College is providing SRF-A training, which does not include live firearms training.

In sum, none of the City's assertions have merit and Blackwater is entitled to its requested relief.

DATED: May 29, 2008

MAYER BROWN LLP
JOHN NADOLENCO
CHRISTOPHER MURPHY

By: s/John Nadolenco
John Nadolenco
Attorneys for Plaintiff
BLACKWATER LODGE AND TRAINING CENTER, INC., dba BLACKWATER WORLDWIDE

MAYER BROWN LLP
JOHN NADOLENCO (SBN 181128)
jnadolenco@mayerbrown.com
CHRISTOPHER MURPHY (SBN 120048)
cmurphy@mayerbrown.com
350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
Telephone: (213) 229-9500
Facsimile: (213) 625-0248

NEIL DYMOTT FRANK MCFALL & TREXLER APLC
MICHAEL I. NEIL
mneil@neildymott.com
1020 2nd Avenue, Suite 2500
San Diego, CA 92101-4959
Telephone: (619) 238-1712
Facsimile: (619) 238-1562

Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT

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BLACKWATER LODGE AND TRAINING CENTER, INC., a Delaware corporation dba BLACKWATER WORLDWIDE;

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KELLY BROUGHTON, in his capacity as Director of the Development Services Department of the City of San Diego; AFSANEH AHMADI, in her capacity as Chief Building Official of the City of San Diego; THE DEVELOPMENT SERVICES DEPARTMENT OF THE CITY OF SAN DIEGO; THE CITY OF SAN DIEGO, a municipal entity; and DOES 1-20, inclusive,

Defendants.

Case No. 08 CV 0926 H (Wmc)

DECLARATION OF WILLIAM J. BOHAC IN SUPPORT OF PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Date: May 30, 2008
Time: 1:30 p.m.
Place: Courtroom of the Honorable Marilyn L. Huff

I, William J. Bohac, declare as follows:

1. My name is William Joseph Bohac. I am a General Contractor, licensed to do business in California. I have worked in construction in San Diego for over thirty years. During this time, I have pulled hundreds of permits for projects in San Diego. I know very well the permitting process, the applicable laws, and the staff at Development Services.

2. Since August 2007, my firm, Noble Construction, has been working with Blackwater and its affiliates on its Otay Mesa facility that is the subject of this lawsuit. Contractors regularly – perhaps in 90% of the circumstances – apply for permits on behalf of their clients.

3. All of the permits Blackwater needed for this facility were routine ministerial permits.

4. A few months ago, we identified a small portion of the Otay facility as a "future use area." The city approved all the plans with this area identified. A "future use area" never affects the permits for the rest of a facility. It is akin to identifying on plans for a house that the homeowner plans to add a swimming pool later.

5. Yesterday, May 28, I visited the San Diego Development Services office to submit plans for this future use, to use the area as a ship simulator. I went because even though a lawsuit is pending, it does not affect me doing my job, which is making sure that any new features on the property are safe and permitted.

6. When I tried to submit plans for the ship simulator, Ziad Doudar (who had been involved with prior inspections at our facility) informed me I needed to deal with John Anderson. When I tried to submit plans to John Anderson, he informed me that he was under orders not to accept any plans for this address or from Blackwater.

7. At that point, I met with Mr. Doudar again, and told him Mr. Anderson would not let me submit the plans. Mr. Doudar then took my plans and told me he was going to meet with Ms. Afsaneh Ahmadi. When he returned, he informed me that Ms. Ahmadi and Mr. Kelly Broughton had allowed the submission.

8. I then met with Ms. Jaba Vega, and began the submittal process. I also submitted the standard payment for express review. Ms. Vega informed me that the fans and electrical features were so minor, that our plans could be approved "over-the-counter." I proceeded to the "mechanical" counter, and the mechanical counter official signed and stamped the plans.

9. I next went to the "planning" counter. The gentleman behind the counter told me that he was also under orders not to accept or approve anything from Blackwater until speaking to his boss, Chris Larson. He examined the plans, called Mr. Larson, and then told me that he was not going to accept them. At my request, he provided me Mr. Larson's number.

10. I next spoke with Mr. Doudar again, and informed him that Mr. Larson would not accept the plans for review. It was both my understanding and Mr. Doudar's that this extraordinary ordeal was highly odd and improper, as all I wished to do was *submit* plans for the normal city review and approval process.

11. After leaving numerous unreturned messages for Mr. Larson, I left a message for Kelly Broughton. Shortly thereafter, Chris Larson finally returned my call. He apologized to me, and informed me he was only following orders, but that he would not accept my plans. Finally, late in the evening, Ms. Ahmadi called and told me the city had changed its mind and would actually accept my plans.

12. In my thirty years working in San Diego, I have never been put through the type of scrutiny and procedures that have lately characterized the process for this facility.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of May 2008 in San Diego, CA.

William J. Bohac